

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**ERNESTO TORRESCANO**  
Claimant

VS.

**IBP, INC.**  
Respondent  
Self-Insured

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Docket No. 193,531

**ORDER**

Claimant appeals from a May 9, 1995, Preliminary Hearing Order entered by Administrative Law Judge Floyd V. Palmer. Appeals Board Member Pro Tem Jeff K. Cooper will serve in place of Appeals Board Member Gary M. Korte who has recused himself from these proceedings.

**ISSUES**

The Administrative Law Judge denied claimant's request for preliminary benefits. The issues raised by claimant on appeal are:

- (1) Whether the claimant timely filed his notice of appeal with the Kansas Division of Workers Compensation Appeals Board.
- (2) Whether claimant gave timely notice of accident to the respondent within ten (10) days, and if not, whether just cause for failing to do so was established.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

On appeal from Preliminary Hearing Order, the Appeals Board has jurisdiction to review a finding that claimant failed to give timely notice of accident. See K.S.A. 44-534a.

- (1) The first issue that the Appeals Board will address is respondent's request that this appeal be dismissed because the claimant's Application For Review was not timely filed. K.S.A. 44-551(b)(1) as amended by S.B. 59 (1995), requires an interested party to file a written request within ten (10) days from the date of a decision of an administrative law judge for Appeals Board review. The claimant's Application for Review was not received by the Appeals Board until a copy was requested from the respondent and faxed to the Appeals Board on June 22, 1995. The Certificate of Service shown at the end of the Application for Review read as follows:

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the above and foregoing APPLICATION FOR REVIEW was served upon the Division of Workers Compensation Appeal Board, 800 SW Jackson St., Suite 600, Topeka, Kansas 66612-1227, by deposition the same in the United States Mail, postage prepaid, this 15th day of May, 1995, and that a copy of the same was served upon the following persons on the same date in the same manner, addressed as follows, to-wit:

" `Attorney' Mail #41  
Legal Department  
IBP, Inc.  
Highway 35, Box 515  
Dakota City, NE 68731-0515

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DIANE F. BARGER  
Attorney for Claimant"

The Appeals Board office staff made a diligent effort to locate the original of the claimant's Application for Review. However, for reasons unknown, possibly either because the Application was lost in the mail or misfiled in the Division of Workers Compensation office, the original was not found. Respondent's copy of the Application for Review was file stamped as received by the respondent on May 17, 1995, within ten (10) days of the Preliminary Hearing Order dated May 9, 1995. The Appeals Board finds that the copy of the claimant's Application for Review that indicated the original application was mailed to the Appeals Board and a copy was mailed to the respondent with receipt by the respondent on May 17, 1995 is persuasive evidence that the claimant mailed the Application for Review on May 15, 1995 and for reasons not attributable to the claimant the Application for Review was not received by the Appeals Board. Accordingly, the Appeals Board denies respondent's request to dismiss this appeal on the basis that the claimant's Application for Review was not timely filed.

(2) The Appeals Board finds that the claimant failed to give notice within ten (10) days of the date of accident as required by K.S.A. 44-520. Further, the record does not establish just cause for claimant's failure to give notice within ten (10) days, although the evidence shows that notice was given within seventy-five (75) days.

Claimant alleges an accidental injury arising out of and in the course of his employment in a series of accidents from December, 1993, through August 5, 1994, with regard to his upper extremities, and alleges a right shoulder injury as a result of a series of accidents from March, 1994, through August 5, 1994. Exhibit 2, to the preliminary hearing transcript, establishes that claimant, through his attorney, served a seven (7) day demand letter on the respondent on August 18, 1994. Service of the demand letter was made more than ten (10) days after the date of the alleged injury.

Claimant alleges that he developed bilateral upper extremity pain while performing his job as a side puller, and alleges that he advised the nurse at IBP, Inc., and was told to put cream lotion on his hands. Claimant testified that he reported to the nurses' station on a daily basis, and that he was given pills and his wrists were wrapped. Claimant was terminated from his employment on August 9, 1994. Claimant did not know the name of the nurse to whom he had reported his injuries and who had treated him. Claimant also had prior work-related injuries which he had reported and for which he had previously obtained medical treatment while working for IBP, Inc. Claimant testified that he never failed to keep up with the production on the line during the period of his alleged accidents.

Danielle Wallace, Head Nurse, also testified in the case. Ms. Wallace testified that all hands-on treatment of any employee was required to be entered in the computer, and that if claimant had been given pills and/or wraps for his wrists then that would have been entered in the computer. Ms. Wallace further testified that there were no records pertaining to any alleged injury between July 30, 1993 and August, 19, 1994, which to her meant there was no hands-on treatment for the claimant. She also testified, in her opinion, any nurse responsible for workers at IBP, Inc., would enter any hands-on treatment in the computer.

Mr. Matt Peteete also testified on behalf of the respondent. Mr. Peteete was claimant's direct supervisor and testified that claimant made no complaints of pain at all to him during the time he was claimant's supervisor, which included the last date claimant worked. Mr. Peteete also testified that he had an opportunity to observe claimant at work, and that he observed no actions from the claimant which would indicate that he was in pain, and that claimant had always been able to keep up with his work duties on the line.

K.S.A. 44-520 provides that a claim is barred where notice is not given within ten (10) days, unless a claimant establishes just cause for failure to give ten (10) days notice, and such notice is to be given within seventy-five (75) days. In this case, notice was given within seventy-five (75) days; however, there was no evidence presented to establish just cause for failure to give notice within ten (10) days.

K.S.A. 44-501(a) places a burden of proving all necessary elements of the workers compensations claims squarely on the shoulders of the claimant. K.S.A. 44-508(g) defines the requisite burden of proof as being by a preponderance of the credible evidence that the claimant's position on the issue is more probably true than not true. Claimant alleges that IBP, Inc., had notice of the injury based on his alleged reporting of problems to the company nurse; however, we find that the evidence from both the dispensary and the claimant's supervisor does not establish that IBP, Inc., was so aware. Therefore, any notice requirements would have to be satisfied by the claimant's demand letter sent to the employer more than ten (10) days after the alleged injury. The Appeals Board finds that under the facts and circumstances of this case that notice was not given within ten (10) days, nor did any just cause exist for not giving notice earlier. Accordingly, that finding by the Administrative Law Judge is affirmed.

**WHEREFORE**, it is the finding, decision and order of the Appeals Board, that the Preliminary Hearing Order entered by Administrative Law Judge Floyd V. Palmer dated May 9, 1995, should be, and hereby is, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1995.

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BOARD MEMBER PRO TEM

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BOARD MEMBER

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BOARD MEMBER

c: Diane F. Barger, Emporia, Kansas  
IBP, Inc. Legal Department, Dakota City, Nebraska  
Joseph W. Hemberger, Kansas City, Kansas  
Floyd V. Palmer, Administrative Law Judge  
Philip S. Harness, Director